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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 77

JAMES RUSSELL HASKIN,

Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA, FOR THE COUNTY OF ORANGE; PATRICIA NOREEN HASKIN, Real Party in Interest,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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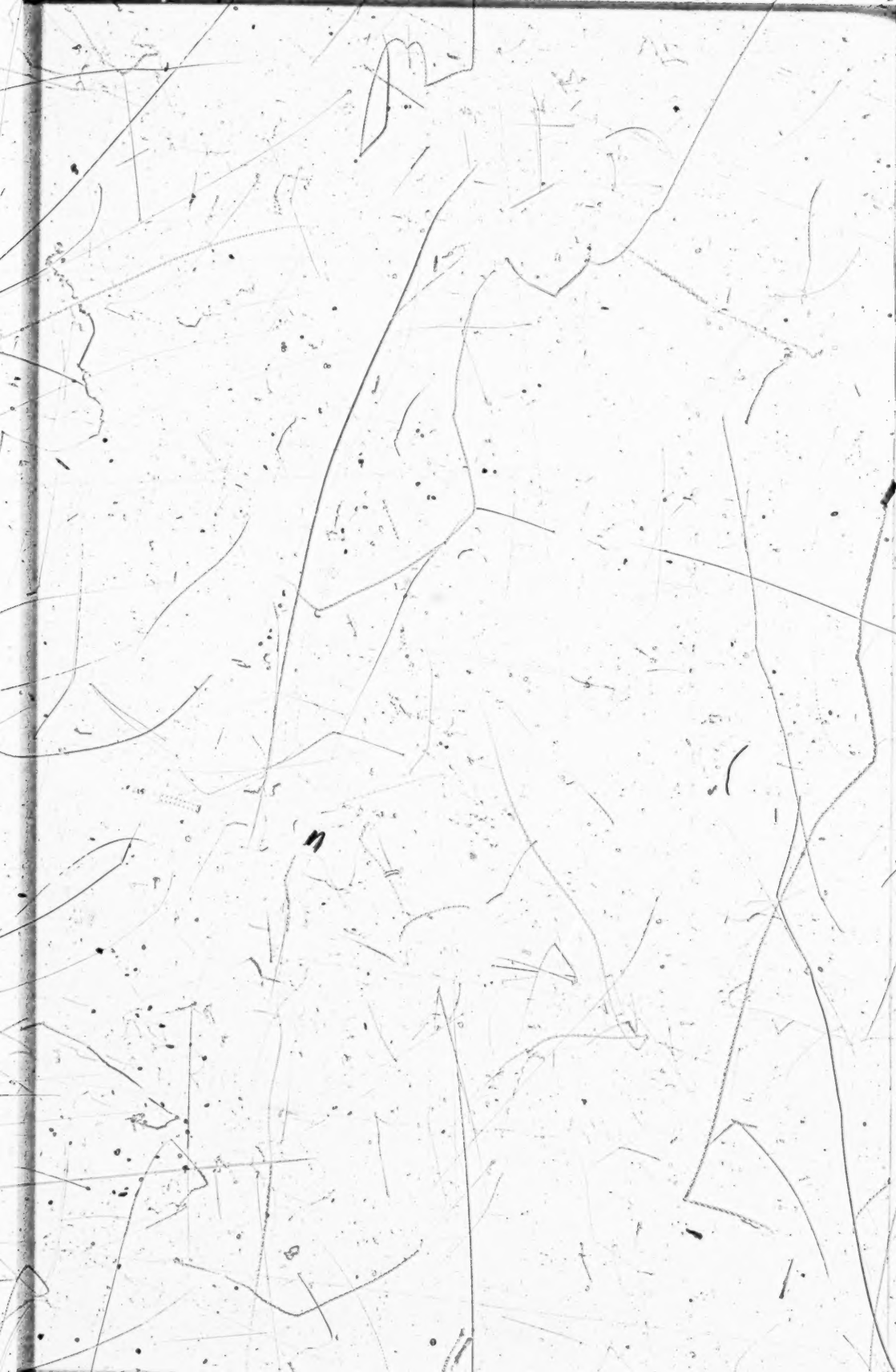

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IN THE

Supreme Court of the United States

October Term, 1968
No. 1219

JAMES RUSSELL HASKIN,

Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA, FOR THE COUNTY OF ORANGE; PATRICIA NOREEN HASKIN, Real Party in Interest,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement of the Case.

Respondent accepts Petitioner's statement of the facts which occurred *prior* to the contempt hearing on September 11, 1968.

At said hearing the Court stated: "The affidavit of the plaintiff seems to establish a *prima facie* case. It seems like the burden is on the defendant to justify his failure to make the payments. Do you want to go ahead?" [R. 2, lines 7-10.]

Counsel for Petitioner replied that he first desired to make some preliminary motions. He then moved to dismiss upon the basis that the amount of money in question was too small to warrant a contempt proceeding. The motion was denied. Counsel for Petitioner then stated: "Do I understand the court correctly that it

is the defendant's burden to move forward as far as the attorney's fees as well?" The court replied: "The affidavit appears to me to be sufficient to indicate that the defendant has sufficient income to have made the payments. So I feel that's enough to establish a *prima facie* case of contempt. It appears to me it would be for him to go ahead with the burden of proof and establish his innocence." [R. 4, lines 10-18.]

Counsel for Petitioner then called plaintiff as a witness under the applicable provision of the Evidence Code, and proceeded to examine her on the merits. [R. 5-26.] Counsel for Petitioner then called Petitioner as a witness. [R. 26-42.] After both parties had concluded, the court adjudged Petitioner guilty of contempt, finding that he had knowledge of the obligation and of the court order, and that he had the funds to pay said order and deliberately failed to do so. [R. 41, lines 10-13.]

Counsel for Petitioner did not at any time or in any manner raise before the trial court the issue of the constitutionality of Section 1209.5 of the Code of Civil Procedure.

Petitioner filed a Petition for Writ of Prohibition with the Court of Appeal, State of California, Fourth Appellate District, which was denied on September 18, 1968 without comment of court. This Petition had sought to prohibit enforcement of the contempt order and alleged, for the first time, the unconstitutionality of Code of Civil Procedure Section 1209.5.

On October 3, 1968, Petitioner filed a Petition for Writ of Review with said Court of Appeal on the grounds of unconstitutionality of the statute and ille-

gality of the contempt order. The Petition was denied without comment on November 26, 1968.

Petitioner then filed a petition for hearing with the California Supreme Court on three separate grounds: (1) constitutionality of said Section 1209.5; (2) insufficiency of information in plaintiff's affidavits establish a *prima facie* case of contempt, and (3) affidavits not properly admitted into evidence. The State Supreme Court denied the Petition without comment.

The Federal Question Was Not Raised at the Trial Court Level, as Required by California Procedure.

As set forth in the foregoing Statement of Facts, Petitioner made a motion in the trial court to dismiss, but upon other than constitutional grounds. At no time did Petitioner register any objection to the constitutionality of Code of Civil Procedure Section 1209.5 at the trial level.

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. [Citations] Noncompliance with such local law can thus be an adequate state ground for a decision below." *Edelman v. California* (1953), 73 S. Ct. 293, 295; 344 U.S. 357, 358-359.

It is a general rule of appellate review, early established and long adhered to in California, in both civil and criminal cases, that questions not raised in the trial court will not be considered on appeal. *Bank of America v. State Board of Equalization* (1962), 209 Cal. App. 2d 780, 798, 26 Cal. Rptr. 348, held that the fail-

ure to raise the constitutionality of a use tax statute in the trial court precluded appellate consideration of the matter, "under the familiar and well-established rule of appellate review that questions not raised in the trial court will not be considered on appeal." (*Apra v. Aureguy* (1961), 55 Cal. 2d 827, 831; 13 Cal. Rptr. 177; 361 P. 2d 897; *Dimmick v. Dimmick* (1962), 58 Cal. 2d 417, 422; 24 Cal. Rptr. 856; 374 P. 2d 824; *People v. Jordan* (1955), 45 Cal. 2d 697, 708; 290 P. 2d 484; *Damiani v. Albert* (1957), 48 Cal. 2d 15, 18; 306 P. 2d 780.)

An exception to the general rule has been recognized by the California courts in those infrequent cases where a fundamental error or gross irregularity has occurred. These exceptions have been limited to cases where there was a lack of jurisdiction in the trial court (*Johnson v. Banducci* (1963), 212 Cal. App. 2d 254, 259; 27 Cal. Rptr. 764), a complete failure to state a cause of action (*Galli v. Brown* (1952), 110 Cal. App. 2d 764, 779; 243 P. 2d 920), or when the error involved a grave matter of public policy (*People v. Rodriguez* (1943), 58 Cal. App. 2d 415, 421; 136 P. 2d 626.)

A contention on appeal that the lower court lacked jurisdiction due to an alleged invalidity of a statute has not been accepted by the California courts as an exception to the aforesaid general rule. For example, in *Metromedia, Inc. v. City of Pasadena* (1963), 216 Cal. App. 2d 270, 273; 30 Cal. Rptr. 731, appeal dismissed 84 S. Ct. 636; 376 U.S. 186, the appellate court held that where only one basis for holding an ordinance unconstitutional was urged during the trial, other constitutional considerations could not be properly urged on appeal. (*Rescue Army v. Municipal Court* (1946), 28

Cal. 2d 460, 465; 171 P. 2d 8; *Hershey v. Reclamation Dist. No. 108* (1927), 200 Cal. 550, 564; 254 Pac. 542.)

The statutory basis for the foregoing appellate rule in this State is found in Code of Civil Procedure Section 906, which provides in pertinent part,

> ". . . the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . ."

and in Penal Code Section 1259, which provides,

> "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. . . ."

Petitioner devotes but one brief paragraph to the point, flatly stating that the constitutional question was raised in a "timely manner in the California Court of Appeal," and citing two California cases in support thereof. The first case (*People v. Rodriguez, supra*) involved the receipt in evidence of a confession in which the prosecution had made abolutely no attempt to show voluntariness in spite of defendant's testimony as to the brutal means used to obtain the confession. The appellate court ruled that a miscarriage of justice had occurred and that it was "not willing to accept less

than an express waiver, at least one not arising from mistake and inadvertence" of defendant's constitutional rights in such regard. The court further stated that "The failure to make a timely and sufficient objection is of no moment where a grave matter of public policy is involved." [p. 421.] The other case cited by Petitioner (*People v. McCoughan* (1957), 49 Cal. 2d 409; 317 P. 2d 974), does not, as we read it, stand for the jurisdictional proposition urged by Petitioner, and the court certainly does not discuss the case in any such terms.

Respondent, therefore, submits that since the constitutionality of Section 1209.5 was not raised in the trial court it cannot be raised for the first time on appeal under California statutes and case law. The statute is a procedural one, which specifies what evidence constitutes a *prima facie* case of contempt in child support cases. Clearly, such a statute does not fall within any of the recognized exceptions to the well-established rule of appellate review which we urge herein.

The State Supreme Court's Denial of Petitioner's Petition for Review Was Based on Adequate Nonfederal Grounds.

The California Supreme Court denied, without comment, Petitioner's Petition for Review. As stated in *Stembridge v. State of Georgia* (1952), 72 S. Ct. 834, 837, 343 U.S. 541, 546:

> "Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment."

There, as here, the failure of petitioner to raise the constitutional question in the trial court was involved, and

was held to be an adequate nonfederal ground upon which the action of the State Supreme Court might properly have been based. (*Bailey v. Anderson* (1945), 66 S. Ct. 66, 68; 326 U.S. 203-207; *Ellis v. Dixon* (1955), 75 S. Ct. 850, 854; 349 U.S. 458, 464.)

As stated in *Lynch v. New York* (1934), 55 S. Ct. 16, 17; 293 U.S. 52, 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must affirmatively appear from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

The burden is on the Petitioner to demonstrate that adequate state grounds cannot account for the decision below. (*Durley v. Mayo* (1956), 76 S. Ct. 806, 809; 351 U.S. 277, 281.)

The Interpretation of Code of Civil Procedure Section 1209.5 by the California Courts Is Controlling.

It is basic that, in the absence of very exceptional circumstances, the United States Supreme Court must accept as controlling the decisions of the state courts upon questions of local law, both statutory and common. (*American Railway Express Co. v. Kentucky* (1927), 47 S. Ct. 353, 354; 237 U.S. 269, 272; *International Union v. Wisconsin Employment Relations Board* (1949), 69 S. Ct. 516, 520; 336 U.S. 245, 251).

The courts of this State do not construe Code of Civil Procedure Section 1209.5 in the same manner as does Petitioner. *Oliver v. Superior Court* (1961), 197 Cal. App. 2d 237, 17 Cal. Rptr. 474, a case involving said statute, held that a hearing on an order to show cause in re contempt is in its nature a criminal proceeding. The court stated that:

> "Contemner stands in a position similar to that of a defendant in a criminal action and he may not be compelled to give testimony against himself. . . . (p. 240). The effect of this section is to place the burden of going forward upon the contemner. It does not shift the burden of proof to him. The latter burden remains with the party prosecuting the order to show cause. Therefore, the evidence introduced as opposed to the prima facie showing of contempt must leave the record in such condition that there remains substantial evidence to sustain the judgment." (p. 242.)

Although Petitioner attempts to distill from Section 1209.5 an interpretation which he states, in effect, forces the contemner to take the stand and thereby violates his constitutional rights against self-incrimination and his entitlement to due process of law, this is quite obviously incorrect. In fact, in the case at hand, Petitioner, by his counsel, prior to trial, took a fifty-one page deposition of plaintiff and, at the contempt hearing, called her to the witness stand as an adverse witness in accordance with well-established California procedure. He then assumed the stand of his own voli-

tion, upon request of his counsel, and without objection of any kind being registered.

There is nothing new or novel about a procedure which provides that, upon the establishment of certain evidentiary facts, a *prima facie* case is established. As stated in *Honeyman v. Hanan* (1937), 58 S. Ct. 273, 274; 302 U.S. 375, 378:

> "The Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

In fact, it would appear that procedures similar to that established in Section 1209.5 have been utilized in contempt hearings in the federal judicial system. *U.S. v. De Simone,* 267 F. 2d 741, certiorari denied 78 S. Ct. 116, 355 U.S. 867, involved a contempt procedure under the Federal Rules of Criminal Procedure. There, it was held that defendant's failure to appear on the return date in compliance with a Federal Grand Jury subpoena "was sufficient in itself to establish a prima facie case as to the requisite intent and wilfulness. 'The burden was then upon the appellant to show that he had in good faith tried to comply.'" The Circuit Court noted that in the contempt proceeding defendant "made no attempt to explain his failure to appear on the return date or his whereabouts from April 28th to May 19th. Under such circumstances the court had little choice but to find him guilty of criminal contempt." (p. 745.) [Cit. *U.S. v. Goldfarb,* 167 F. 2d 735.]

Conclusion.

The issuance of a writ of certiorari being a matter of "sound discretion sparingly exercised" (Rule 30), it is respectfully submitted that the Petition for a Writ of Certiorari should not be granted in this case.

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